Public Prosecutor v Sim Keng Tee

HIGH COURT (JOHOR BAHRU) — CRIMINAL TRIAL NO MT(3)45–4 OF 2008
MOHD ZAWAWI SALLEH JC
25 AUGUST 2008

Criminal Law — Dangerous drugs — Trafficking — Whether accused was in possession of drugs — Whether he was in custody and control of drugs found in the boot of the car in question — Dangerous Drugs Act 1952 s 2

Criminal Law — Dangerous Drugs Act 1952 — s 39B(1)(a) — Trafficking in dangerous drugs — Ingredients of offence — Whether prosecution established prima facie case as per charged — Proper inference for the court to draw — Criminal Procedure Code s 180

Evidence — Adverse inference — Failure to call material witness — Whether presumption arose — Evidence Act 1950 s 114(g)

Evidence — Circumstantial evidence — Securing conviction on — Cumulative effect — Whether prima facie case proven — Whether conviction of accused secure

On 7 April 2007, SP4, acting on the tip-off received by his superior, ASP Howe Sye Eng, and on his instruction, arrested the accused at a restaurant. A body search was conducted on the accused and among the items recovered were a solex key. The accused was then brought to his house where a set of car keys were seized from the said room. A search was then made in respect of the car, Proton Wira JFX 8122, registered under the accused's name. From the boot of the car, SP4 recovered two plastic containers containing liquids which were later confirmed by the chemist to contain 1407.96g of methamphetamine, the subject matter of the charge. In cross-examination, SP4 made the following concessions: that the condominium unit had three rooms and all the rooms were occupied. The accused person informed SP4 that on 6 April 2007, one day before his arrest, one Lee Gin Fong had borrowed the car in question. Apart from the formal aspects of his evidence, SP6, investigating officer, in his cross-examination, stated that the accused had three adopted children who also had access to the car in question. Further, one Lee Gin Fong was arrested and charged together with the accused and subsequently released and was being held under the Dangerous

A Drugs (Special Preventive Measures) Act 1985 at the Pusat Pemulihan Akhlak Muar for drug trafficking activities in methamphetamine in liquid form, similar to the subject matter of the charge herein.

B

Held, acquitting the accused without call to enter defence:

(1) There was no evidence that the accused had handled the drugs or that he had any knowledge of them. There was no evidence that the police had seen the accused putting any drugs in the boot of the car in question. The only link between the accused and the offending exhibits was the car which was registered under the accused's name and the car keys which were found from the room occupied by the accused. The evidence against the accused was essentially of juxtaposition, amounting to nothing more than grave suspicion (see para 11(a)).

(2) The car keys were found in the unlocked bedroom of the accused person. There was no impediment for the adopted children to conceal or to put the two plastic containers, the subject matter of this charge, in the boot of the car in question and put the keys back in the absence of the accused. SP6 ought to have taken greater efforts to investigate this. He could have gone to the unit the next day, or the night in question to look for the adopted children. Regrettably, this was not done. That being the case, SP6 cannot deny that the adopted children had access to the car (see para 11(b)).

(3) Lee Gin Fong ought to have been called by the prosecution or offered for cross-examination or at least made available to the defence at the close of the prosecution or in default, or otherwise an explanation should have been offered as to why the prosecution was unable or unwilling to call him. He was a suspect and he is not just any witness but an important and material witness to the case. His testimony would have made a significant difference to the prosecution case. By such failure, not only was there a gap in the narrative of the prosecution case but also the presumption under s 114(g) of the Evidence Act 1950 would be attracted (see para 11(b)).

(4) The prosecution had failed to prove that the accused had exclusive possession of two plastic containers found in the boot of the car in question given the fact that others, too, had access to the car in question. Further, there was no factual matrix on which the court could make an inference that the accused had knowledge of its presence in the boot of the car in question. The mere presence of the two plastic containers in the boot of the car in question which was registered under the accused's name, without more, would be insufficient to infer that the accused had the requisite knowledge (see para 11(c) & (d)).

[Bahasa Malaysia summary

Pada 7 April 2007, SP4, bertindak atas maklumat yang diterima oleh ketuanya, ASP Howe Sye Ng, dan atas arahannya, menangkap tertuduh di sebuah restoran. Pemeriksaan badan telah dilakukan ke atas tertuduh dan antara barang yang ditemui adalah kunci solex. Tertuduh kemudian dibawa ke rumahnya di mana satu set kunci kereta telah dirampas daripada bilik tersebut. Carian dilakukan ke atas kereta, Proton Wira JFX 8122, yang berdaftar atas nama tertuduh. Daripada but kereta, SP4 telah menjumpai dua bungkusan plastik mengandungi cecair yang kemudian telah disahkan oleh ahli kimia mengandungi 1407.96g methamphetamine, perkara yang dipersoalkan dalam pertuduhan. Dalam pemeriksaan balas, SP4 telah membuat konsesi seperti berikut: bahawa unit kondominium mempunyai tiga bilik dan semua bilik didiami. Tertuduh telah memberitahu SP4 bahawa pada 6 April 2007, sehari sebelum tangkapannya, Lee Gin Fong telah meminjam kereta yang dipersoalkan. Selain daripada aspek formal keterangannya, SP6, pegawai penyiasat, dalam pemeriksaan balasnya, menyatakan bahawa tertuduh mempunyai tiga anak angkat yang juga mendapat akses kepada kereta yang dipersoalkan. Selanjutnya, Lee Gin Fong telah ditangkap dan dituduh bersama tertuduh dan kemudiannya dibebaskan dan ditahan di bawah Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 di Pusat Pemulihan Akhlak Muar kerana kegiatan mengedar dadah methamphetamine dalam bentuk cecair, sama seperti pertuduhan ini.

Diputuskan, membebaskan tertuduh tanpa dipanggil untuk memasuki pembelaan:

(1) Tiada bukti yang tertuduh memegang dadah atau dia mempunyai apa-apa pengetahuan tentangnya. Tiada bukti yang polis telah melihat tertuduh meletakkan apa-apa dadah dalam but kereta yang dipersoalkan. Satu-satunya kaitan antara tertuduh dan ekshibit tersebut adalah kereta yang didaftarkan atas nama tertuduh dan kunci kereta yang dijumpai dalam bilik yang didiami tertuduh. Bukti terhadap tertuduh diatur seiring, dan tidak lebih daripada rasa syak (lihat perenggan 11(a)).

(2) Kunci kereta telah dijumpai dalam bilik tidur tertuduh yang berkunci. Tiada penghalang untuk anak angkat tersebut menyembunyikan atau meletakkan balik kunci itu semasa ketiadaan tertuduh. SP6 patut lebih berusaha untuk menyiasat perkara ini. Dia patut boleh pergi ke unit itu keesokan hari, atau pada malam yang dipersoalkan untuk mencari anak angkat tersebut. Namun begitu, ini tidak dilakukan. Begitu kesnya, SP6 tidak boleh dinafikan bahawa anak angkat tersebut mempunyai akses kepada kereta itu (lihat perenggan 11(b)).

(3) Lee Gin Fong patut dipanggil oleh pihak pendakwaan atau ditawarkan untuk pemeriksaan balas atau sekurang-kurangnya dipanggil untuk pihak pembelaan di akhir pendakwaan atau sekiranya gagal, atau sebaliknya satu penjelasan patut diberikan berhubung sebab pihak pendakwaan tidak dapat atau enggan memanggilnya. Testimoninya boleh membuat perbezaan yang bermakna kepada kes pendakwaan. Jika gagal, bukan sahaja terdapat jurang dalam naratif kes pendakwaan tetapi juga andaian di bawah s 114(g) Akta Keterangan 1950 digunakan (lihat perenggan 11(b)).

(4) Pihak pendakwaan telah gagal membuktikan yang tertuduh mempunyai milikan eksklusif dua bungkusan plastik yang dijumpai dalam but kereta yang dipersoalkan berdasarkan fakta yang lain, juga, mempunyai akses kepada kereta yang dipersoalkan. Selanjutnya, tiada matriks faktual di mana mahkamah membuat inferens yang tertuduh mempunyai pengetahuan tentang kewujudannya dalam but kereta yang dipersoalkan. Kewujudan semata-mata dua bungkusan plastik dalam but kereta yang dipersoalkan yang didaftarkan atas nama tertuduh, tidak lebih daripada itu, adalah tidak memadai untuk membuat inferens bahawa tertuduh mempunyai pengetahuan yang diperlukan (lihat perenggan 11(c) & (d)).]

Notes

For cases on failure to call material witness, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 161–171.

For cases on s 39B(1)(a) of the DDA 1952, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 320–446.

For cases on securing conviction on circumstantial evidence, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 161–171.

For cases on trafficking dangerous drugs, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 126–139.

Cases referred to

Abdullah Zawawi v PP [1985] 2 MLJ 16 (refd)
Abdullah Zawawi bin Yusoff v PP [1993] 3 MLJ 1 (refd)
Balachandran v PP [2005] 2 MLJ 301 (refd)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232 (refd)
Gooi Loo Seng v PP [1993] 2 MLJ 137 (refd)
Idris v PP [1960] MLJ 296 (refd)
Leow Nghee Lim v Reg [1956] MLJ 28 (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65 (refd)
Munusamy v PP [1987] 1 MLJ 492 (refd)
Ong Ah Chuan v PP [1981] 1 MLJ 64 (refd)
Pang Chee Meng v PP [1992] 1 MLJ 137 (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705 (refd)

PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1 (refd)
PP v Haniff Basree bin Abdul Rahman [2007] 2 MLJ 320 (refd)
PP v Letchumanan a/l Krishnan [2008] 3 MLJ 290 (refd)
PP v Lin Lian Chen [1992] 2 MLJ 561 (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393 (refd)]
PP v Tukiman bin Demin [2008] 4 MLJ 79 (refd)
Rosenizam bin Maharam v PP [2003] 5 MLJ 49 (refd)
Ti Chuee Hiang v PP [1995] 2 MLJ 433 (refd)
Tong Peng Hong v PP [1955] MLJ 232 (refd)
Wong Nam Loi v PP [1997] 3 MLJ 795 (refd)

Legislation referred to

Criminal Procedure Code s 180(1)
Dangerous Drugs Act 1952 ss 2, 37(d), 39B(1)(a)
Dangerous Drugs (Special Preventive Measures) Act 1985
Evidence Act 1950 s 114(g)

Husmin Hussin (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.
Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the accused.

Mohd Zawawi Salleh JC:

BACKGROUND

[1] Sim Keng Tee ('the accused'), was charged for trafficking in 1407.96g of methamphetamine, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s 39B(2) of the same Act.

[2] The accused claimed trial to the charge.

[3] The prosecution called 5 witnesses to support its case. They are Encik Muhammad Yazid bin Ibrahim (SP1); L/Kpl James a/k Ragai (SP2); Sjn Anwar bin Md Dini (SP3); ASP Zainozin bin Ishak (SP4) and Insp Shafizan bin Mohd Sharif (SP5).

[4] At the end of the prosecution's case, the court had acquitted and discharged the accused without calling upon him to enter his defence.

[5] The prosecution now files an appeal against the whole of the said decision.

THE CHARGE

[6] The charge in Bahasa Malaysia was in the following terms:

Bahawa kamu pada 7.04.2007, jam lebih kurang 10.50 malam, di tempat parking kereta Lot A 723, Blok A, Jln Persiaran Titiwangsa Utara, Pangsapuri Sri Akasia, Taman Tampoi Indah, di dalam daerah Johor Bahru, di dalam Negeri Johor Darul Ta'zim, telah didapati mengedar dadah berbahaya iaitu sejumlah 1407.96 gram Methamphetamine dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 39B(1) (a) Akta Dadah Berbahaya, 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

THE PROSECUTION CASE

[7] The brief facts relevant to this judgment are these:

7.1 Acting on information received and on instruction of his superior, SP4 arrested the accused and two other persons on 7 April 2007 at the Restaurant TLC at No 36, Jalan Padi Harmoni 1, Bandar Baru Kangkar Pulai. They were playing mahjong. The two other persons were released immediately thereafter.

7.2 A body search was conducted on the accused. Amongst the items recovered from him was a solex key (exh P14). He was brought to his house which is at Block A, Tingkat 8–15, Pangsapuri Akasia, Taman Indah, Johor Bahru ('the said unit').

7.3 A search was made by SP4 in respect of the said unit. From the room occupied by the accused, SP4 found a set of car keys (exh P15A and exh P15B).

7.4 Using the set of car keys seized from the said room, a search was then made in respect of the car, Proton Wira JFX 8122 ('the car in question') which was parked at Lot A 723, Block A of the said pangsapuri. From the boot of the car, SP4 recovered 2 plastic containers (exh P5 and exh P6) which contained liquids. These liquids were analysed by the chemist (SP1) and confirmed to contain 1407.96g of methamphetamine, the subject matter of the charge. Since learned counsel for the accused in his submission had not raised any issue on the identity of the offending exhibits and the testimony of the chemist, I think it is not necessary for me to advert to that part of evidence. I accepted his findings with regard to the identification and method of analysis of that drugs. I was satisfied that the analysis was properly conducted by SP1 and cannot be faulted.

7.5 In cross-examination, SP4 made the following concessions:

(a) that the condominium unit had three rooms and in all the rooms there were signs of occupation, meaning evidence of the rooms being occupied;

(b) that 'seorang anak angkat' of the accused person stayed with him at the unit; and

(c) that the accused person informed him (SP4) that on 6 April 2007, one day before his arrest, one Lee Gin Fong had borrowed the car in question.

7.6 Apart from the formal aspects of his evidence, SP6 (investigating officer), in his cross-examination, made the following concessions:

(a) that he cannot deny that the accused had three 'anak angkat' and they were Ho Phooi Chee, Ho Yong Sen and Wong Chin Cheng and further cannot deny that they had access to the car in question;

(b) that Lee Gin Fong was arrested and charged together with the accused and subsequently released on instructions from the office of the public prosecutor in Putrajaya; and

(c) that Lee Gin Fong is currently being held under the Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 ('LLPK') at the Pusat Pemulihan Akhlak Muar for drug trafficking activities in methamphetamine in liquid form like in exh P5 and exh P6.

[8] Concerning the concessions made by both SP4 and SP6, it is to be noted that these concessions could amount to evidence as the witnesses here agreed to the suggestions made by defence counsel during cross-examination. In *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1, Augustine Paul J said at p 121:

> A suggestion in cross-examination can only be indicative of the case put forward or the stand taken by the party on whose behalf the cross-examination is being conducted, but to no extent whatsoever can it be a substitute for evidence, *if it is clearly repudiated by the witness to whom it is made.*
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> (Emphasis added.)

[9] Perhaps it is not out of place in this context to refer to the judgment of Taylor J in *Leow Nghee Lim v Reg* [1956] MLJ 28. At p 29 Taylor J said:

> ... [A]n accused is entitled to the benefit of anything which can be elicited from the prosecution evidence; the onus is on the prosecution to adduce convincing evidence of the facts necessary to raise a presumption before the onus on any issue is shifted.

BURDEN ON THE PROSECUTION

[10] It is the duty of the prosecution at the close of its case to prove a prima

facie case against the accused as provided under s 180(1) of the Criminal Procedure Code. The steps that should be taken by the trial court at the close of the prosecution's case had been set out in *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393, *Balachandran v Public Prosecutor* [2005] 2 MLJ 301, *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65 and *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1.

FINDING OF THE COURT

[11] On the maximum evaluation of the evidence presented by the prosecution, this court found that the prosecution had failed to prove a prima facie case against the accused for the following reasons:

(a) *No custody and/or control*

To bring home a charge of trafficking in dangerous drugs, the prosecution must prove that what the accused did in this case come within the meaning of trafficking as defined in s 2 of the Dangerous Drugs Act 1952 which defines trafficking as follows:

> Unless the context otherwise requires, trafficking includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying, or distributing any dangerous drug.

The offending drugs in the present case were recovered from the boot of the car in question which was registered under the accused's name. Given that fact, can he be accused of doing any of the acts envisaged in the context of s 2 above? As a matter of common sense, it follows that to prove trafficking under that section, it would be necessary for the prosecution first and foremost to prove that the accused was in possession of the drugs or that he was in custody and control of the drugs found in the boot of the car in question, for, unless he was in possession or in custody or control of it, he would not be in a position to traffic in such drugs (*Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705).

In *Leow Nghee Lim v Reg* [1956] MLJ 28 Taylor J at p 28 said:

> There is no presumption of custody. The presumption is from custody. Unless custody is established, the chain of reasoning is broken. Custody means having care or guardianship; goods in custody are in the care of the custodian and, by necessary implication, he is taking care of them on behalf of someone else. You cannot take care of goods unless you know where they are, and have the means of exercising control over them. Custody therefore implies knowledge of the existence and whereabouts of the goods and power of control over them not amounting to possession.

As regards the word 'control', it was said in *Rosenizam bin Maharam v Public Prosecutor* [2003] 5 MLJ 49 at pp 64–66 as follows: A

> The word 'control' has not been statutorily defined in the Act and so guidance may be derived from its ordinary popular dictionary meaning as follows:
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> (1) the power of directing, command, restraint (*The Concise Oxford Dictionary* (9th Ed, 1995)); and B
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> (2) exercising restraint or directing influence (*Black's Law Dictionary*).
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> Illustrations of the meaning of 'control' are also to be found in judicial pronouncements of our courts. C
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> In *Ho Seng Seng v Rex* [1951] MLJ 225, the appellant was found carrying a basket containing one large paper parcel and one small. The large parcel, which was on top, contained 12 pieces of opium. The appellant was convicted by the district judge under s 6 of the then Dangerous Drugs Ordinance. When he was arrested, the appellant said that the basket had been handed over to him by another person named Ah Tan, who had asked him to go to a coffee shop and wait for him there, and that he knew nothing of the contents of the basket. D
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> On appeal, Brown Ag CJ sitting as a High Court judge held that the district judge had misdirected himself upon the burden of proof and allowed the appeal, holding that the element of knowledge is implicit in the word 'control' and that one cannot have control of a thing unless one knows it is there ie the onus was upon the prosecution to prove to the satisfaction of the court that the appellant knew that a dangerous drug was in the basket, which in turn would raise the presumption under s 37(d) that the appellant was in possession of it and knew that it was opium. E F
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> The learned Acting Chief Justice explained that the term 'control' has a more restricted meaning than 'possession' and referred to the characteristics of 'possession' laid down by the Court of Criminal Appeal in *Toh Ah Loh and Mak Thim v Rex* [1949] MLJ 54 as follows:
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> (a) the possessor must know the nature of the thing possessed; G
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> (b) he must have a power of disposal over it; and
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> (c) he must be conscious of his possession of the thing.
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> The learned Acting Chief Justice opined that for the term 'control', it is sufficient for the prosecution to prove characteristics (b) and (c), in which case the prosecution is deemed to have proved characteristic (a) for the purposes of 'possession'. H
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> Ambrose J in *Neo Koon Cheo v Reg* [1959] MLJ 47 disagreed with the view expressed by the learned Acting Chief Justice in *Ho Seng Seng* and explained that the word 'control' must be construed to mean any form of control other than actual physical control, and that actual physical condition would be 'custody' for which other names are 'physical possession', 'de facto possession' and 'detention'. I

A In *Neo Koon Cheo*, a party of three detectives made a raid on the attic of a premises, and on entering the attic, two of the detectives saw the appellant holding a confectionary tin in his hands and attempting to get out of the attic through an opening. On examination the tin was found to contain a phial of chandu, a small tin of chandu dross, an opium pipe-head, a rag and some tools. The appellant was charged with and convicted of possession of prepared opium and smoking utensils in contravention of ss 9 and 10(2) respectively of the Dangerous Drugs Ordinance. In dismissing the appeal, Ambrose J held that the contents of the confectionary tin were in the appellant's control.

C *Neo Koon Cheo* was followed by Jeffrey Tan JC (now J) in *Public Prosecutor v Sim Ah Ba & Anor* [1997] 4 MLJ 47 pertaining to the construction of the word 'control' as any form of control other than physical control.

On the evidence adduced by the prosecution, it has not been proved that the accused was in custody and/or control of the offending exhibits, especially physical custody. It is still a mystery as to how the offending exhibits got into D the boot of the car in question and there is no evidence that the accused had handled the drugs or, he had any knowledge of them. There is no evidence that the police had seen the accused putting any drugs in the boot of the car in question. The only link between the accused and the offending exhibits is the car which was registered under the accused's name (see exh P24) and the E car keys (exh P15A and exh P15B) which were found from the room occupied by the accused.

It was clear from the evidence of SP4 that the accused was arrested as a result of a tip-off received by his superior, ASP Howe Sye Eng. Whether the tipster F was a paid informer or otherwise was not revealed because ASP Howe Sye Eng was not called to testify. The police was not informed of the name of the suspect or even the registration number of the vehicle involved. No evidence adduced n court to indicate whether those impugned dangerous drugs would be in liquid form like exh P5 and exh P6 or would be hidden in any part of G the vehicle and whether any other third party would have access to them. These questions were relevant because one Lee Gin Fong was also arrested and charged with the accused person for trafficking in methamphetaminen in liquid form like in exh P5 and exh P6, the subject matter of the charge. In another tip-off case, Edgar Joseph Jr J in *Abdullah Zawawi bin Yusoff v Public* H *Prosecutor* [1993] 3 MLJ 1 at p 7 had occasion to opine:

> With respect, given the fact that this was a case where the police were acting on a tip-off, undoubtedly by an informer, who might have been a paid informer … the onus was not on the defence to prove possibility of access by others but on the prosecution to exclude such possibility.

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There was no evidence from which it could reasonably inferred that the accused had custody and/or control of exh P5 and exh P6 found in the boot of the car in question. The evidence against the accused was essentially of juxtaposition, amounting to nothing more that grave suspicion.

On the question of 'presumptive possession of drugs' as provided for in s 37(d) of the Act, I respectfully agree with the proposition of law enunciated by Thomson J (as he then was) in *Tong Peng Hong v Public Prosecutor* [1955] MLJ 232 that a vehicle in which a drug is carried does not ipso facto fall within the words of 'anything whatsoever containing any dangerous drugs' and therefore, the presumption under s 37(d) does not arise in this case. This proposition of law was approved by the Supreme Court in the case of *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561.

(b) *No exclusive user of the car in question*

There is no evidence that the accused person is the sole exclusive user of the car in question. It is settled law that to sustain a conviction either for the offence of possession or trafficking under the Act, exclusivity of area or place where the drug was found, must be proved by the prosecution. It is therefore incumbent on the prosecution to discharge this burden. If there are gaps, the prosecution must close the gaps. There is also no duty on the defence to prove possibility of access by others to the dangerous drugs but on the prosecution to exclude such possibility (see *Abdullah Zawawi v Public Prosecutor* [1985] 2 MLJ 16; *Pang Chee Meng v Public Prosecutor* [1992] 1 MLJ 137, *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137 and *Public Prosecutor v Tukiman bin Demin* [2008] 4 MLJ 79).

On the evidence adduced, the car keys were found in the unlocked bedroom of the accused person. There is no impediment for the 'anak-anak angkat' to conceal or to put both exh P5 and exh P6 in the boot of the car in question and put the keys back in the absence of the accused. There ought to be investigation on this aspect. The IO (SP6) ought to have taken greater efforts to investigate this. He could have gone to the unit next day, or the night in question to look for 'anak-anak angkat'. Regrettably, this was not done. That being the case, the IO cannot deny that 'anak-anak angkat' had access to the car.

Further, the unchallenged evidence adduced by the prosecution reveals that Lee Gin Fong is a real person. He was arrested and charged with the accused person. He was subsequently released and currently being detained under 'LLPK' for trafficking in methamphetamine in liquid from like in exh P5 and exh P6. In addition, the accused person had told SP4 that Lee Gin Fong had borrowed the car in question the day before, that is, on 6 April 2007. Why was Lee Gin Fong not produced or his 112 statement tendered? Surely, Lee Gin Fong can be located, why is he not produced? His 112 statement was recorded from him but why it was not produced? Lee Gin Fong could have clear away doubts especially he is now being detained for drug trafficking activities. Obviously, he was a suspect and he is not just any witness but an important and material witness to the case. His testimony would made a significant difference to the prosecution case. That being the case, he ought to have been called by the prosecution or offered for cross-examination or at

least made available to the defence at the close of the prosecution or in default, or otherwise been given an explanation why the prosecution was unable or unwilling to call him. Further, there was no suggestion that his testimony would have been hostile or unreliable. Therefore, by such failure, not only there was a gap in the narrative of the prosecution case but also the presumption under s 114(g) of the Evidence Act 1950 would be attracted (see *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 and *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433).

(c) *Circumstantial evidence is not strong enough*

It is settled law that a conviction for possession of dangerous drugs may be predicated on circumstantial evidence and the drugs need not be found in actual physical possession of the accused, as long as it is found in a place or area under his control or custody. However, where the prosecution relies on wholly circumstantial evidence to prove possession of dangerous drugs, the circumstantial shown, must, as in all other criminal cases, exclude every other reasonable hyphothesis other than that of guilt; and proof amounting only to strong suspicion or a merely possibility is insufficient to sustain a conviction (see: *Idris v Public Prosecutor* [1960] MLJ 296, *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 and *Public Prosecutor v Letchumanan a/l Krishnan* [2008] 3 MLJ 290). The Court of Appeal in *Public Prosecutor v Haniff Basree bin Abdul Rahman* [2007] 2 MLJ 320 said at p 346:

> Where the evidence is wholly circumstantial, what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope (see: *Chan Chwen Kong v Public Prosecutor* [1962] MLJ 307) ... Circumstantial evidence should be such that when you look at all the surrounding circumstances, you find such a series of undersigned, unexpected coincidences that, as a reasonable person you will find your judgment is compelled to one conclusion. If the circumstantial evidence is such as to fall short of that standard, if it does not satisfy that test, if it leaves gaps, then it is of no use at all (see *Idris v Public Prosecutor* [1960] MLJ 96).

The strength of the circumstancial evidence in this case is not strong enough to point to the irresistible inference that the accused person had custody/control of exh P5 and exh P6. The following inference can be made:

(i) that Lee Gin Fong put exh P5 and exh P6 in the boot of the car in question;

(ii) that the 'anak angkat' put exh P5 and exh P6 in the boot of the car in question;

(iii) that the accused put exh P5 and exh P6 in the boot of the car in question; or

(iv) that anyone of the above put exh P5 and exh P6 in the boot of the car in question.

The prosecution had failed to prove that the accused had exclusive possession of exh P5 and exh P6 found in the boot of the car in question given the fact that others, too, had access to the car in question.

(d) *Knowledge of presence of exh P5 and exh P6 in the boot of the car*

It is settled law that possession encompasses the element of physical as well as an element of knowledge and without knowledge there can never be possession under the Act. Knowledge is a matter of fact, which in the nature of things cannot be proved by direct evidence. It can only be proved by inferences from the surrounding circumstances. In *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64, Lord Diplock said at p 69:

> Proof of the purpose for which an act is done, where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which criminal courts are very familiar. Generally, in the absence of an express admission by the accused, the purpose with which he did an act is a matter of inference from what he did.

A case where knowledge is proven by direct and by inference or circumstantial evidence is *Wong Nam Loi v Public Prosecutor* [1997] 3 MLJ 795. The appellant was driving a motorvan from Butterworth to Nibong Tebal when he was stopped by the police at a road block. The police found a refrigerator lying on its side behind the driver's seat. On examination of the refrigerator, the police found 80 blocks of white substance inside, confirmed by chemist to be heroin weighing 20,269.5g. The accused said that he was innocent carrier of the refrigerator which belonged to a friend known as 'Lim' and had no knowledge of its content. The Court of Appeal held that the appellant had knowledge of the drugs by inference from the following circumstances: (1) the appellant did not protest nor display any conduct consistent with his lack of knowledge of the drugs when the drugs were found; (2) after the appellant was arrested and handcuffed, he pointed out to the refrigerator; and (3) on the way to police station, the appellant admitted to conveying a few katis of the drugs and tried to bribe the police officers. The court held that there was ample evidence both direct and by necessary inferences to show that the appellant knew that the refrigerator contained heroin.

In the instant case, there is no factual matrix on which the court can make inference that the accused had knowledge of presence of exh P5 and exh P6 in the boot of the car in question. The mere presence of exh P5 and exh P6 in the boot of the car in question which is registered under the accused's name, without more, would be insufficient to infer that the accused had the requisite knowledge. The accused knowledge of presence of exh P5 and exh P6 may be inferred if there are additional circumstances tending to buttress such an inference. These additional circumstances include: (1) incriminating statements by the accused; (2) attempted flight or furtive gesture; (3) personal

items owned by the accused mingle with offending exhibits; (4) finger prints; etc. In this case, there is no such evidence proffered by the prosecution. In fact, the accused conduct is very consistent with his innocence. The court cannot indulge in conjecture and speculation in drawing an inescapable inference from the set of facts in this case that the accused had knowledge of exh P5 and exh P6 in the boot of the car in question.

CONCLUSION

[12] I had subjected the prosecution evidence to maximum evaluation and asked myself this question: 'If I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case?' For the reasons already given, my answer is in the negative and in the result, the accused was acquitted and discharged without calling upon him to enter his defence.

Accused acquitted without call to enter defence.

Reported by Ashgar Ali Ali Mohamed